CHINA INSURANCE CO. LTD. v. YEONG AH LAN & ANOR.

[O.C.J. (Syed Othman J.) August 1, 1973]
[Johor Bahru — Civil Suit No. 382 of 1968]

Practice and Procedure — Delay in giving notice of trial — Application to dismiss action — Notice of intention to proceed — Failure to give notice — R.S.C. 1957, O. 36 r. 12, O. 64 r. 13 & O. 70 r. 1.

In this case the defence had been filed on August 17, 1969. No further proceedings were taken by either party, except for a notice of change of solicitors on August 24, 1969. On June 13, 1971 the defendant's solicitor was served with notice of trial. No notice of intention to proceed had been given. The defendant applied for the notice of trial to be set aside and for the dismissal of the action.

Held: (1) in the circumstances this was not a case which justified the dismissal of the action;

(2) as the plaintiff had failed to give one month's notice of intention to proceed, the notice of trial must be set aside.

Cases referred to:-

(1) *Krakauer* v. *Katz* [1954] 1 All E.R. 244.

(2) *May* v. *Wooding* 3 M. & S. 500.

CIVIL SUIT.

P. Williams for the plaintiffs.

S. S. Lee for the defendants.

Syed Othman J.: This is an application on behalf of the defendants for the notice of trial filed on behalf of the plaintiffs on 31st May, 1971 to be set aside on the ground that the plaintiffs have failed to comply with Order 64 rule 13 of the Rules of the Supreme Court and for dismissal of the action for want of prosecution as the plaintiffs have failed to give notice of trial within the period provided by Order 36 rule 11.

On behalf of the defendants it is deposed in the affidavit supporting the application that the last proceeding had in the action was the filing of the defence on 17th August, 1969 and since that date no further proceedings have been taken by either party, except that the plaintiffs' solicitors on 24th August, 1969 gave notice that they were acting for the plaintiffs in this suit in place of Messrs Williams & Co. It is also shown that on 13th June, 1971 the defendants' solicitor was served with the notice of trial.

There is no affidavit in reply.

I shall deal first with Order 36 rule 12. So far as relevant to the present case it reads:

"If in any matter where a notice of trial is required the plaintiff does not within six weeks after the time when he first becomes entitled to give notice of trial under rule 11 of this Order, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the court or judge to dismiss the action for want of prosecution; and on the hearing of such application, the court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the court or judge may seem just."

I am obliged to Mr. Lee for having indicated that the court has a discretion under this rule. He has only asked me to consider the question of delay as a ground for dismissing the action.

In *Krakauer* v. *Katz*,[1] counsel for the defendant suggested that the delay (12 years) should be such as analogous with the Limitation Act and Denning L.J. made the cautious remark:

"... if a plaintiff allows an action to go to sleep for 6 years, the court in its discretion will usually dismiss the case unless the plaintiff can show good reason why he should be allowed to go with it."

From what was said here it is clear that even in a case of long delay the court would not dismiss the action if good reason is shown. The clear implication is that the court is not concerned with slight delay.

In exercising the discretion to dismiss an action under the rule, as it stands now, I do not think that delay on the part of the plaintiff in giving notice of trial should be the sole consideration as under the rule if the plaintiff does not give the notice, the defendant may give it. I am therefore of the view that in making the application for an action to be dismissed it is not enough for the defendant to show the failure of the plaintiff to give the notice in due time; he must also show why he himself could not have given the notice, as the rule gives him the right as a first choice. The choice to apply for dismissal is secondary. The indications appear to be that if he takes advantage of the rule by giving notice of trial before the plaintiff does so, the court may be inclined to give him some favourable order which would normally be in the form of costs. In any case the delay here is very slight and not at all extreme compared to *Karkauer's* case. I do not therefore consider this is a case which justifies the dismissal of the action.

I come now to Order 64 rule 13. Mr. Lee has argued that this rule is mandatory in view of the word "shall" appearing in it in the requirement of one month's notice. The rule reads:

"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed..."

Mr. Williams for the respondents (plaintiffs) though agreeing that one month's notice should have been given before giving the notice of trial, argues that the rule does not say that if the one month's notice is not given the notice of trial can be set aside. I agree there is no indication in the rule what would be the consequence if it is not complied with. But Order 70 rule 1 provides:

"Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

This rule is clear. The proceedings are not void by reason of failure to comply with any rule. It is at the discretion of the court or a judge whether to set them aside wholly or in part or deal with them in such manner and upon such terms as the court or judge shall think fit. I would therefore say that although Order 64 rule 13 contains specific requirements, non-compliance with the provision does not render the whole proceedings void.

In *May* v. *Wooding*[2] a verdict was obtained more than 3 years before judgment was signed and it was held that although notice was not given (as was the requirement then), the judgment was duly signed.

The facts of *Krakauer's* case, *supra*, are these:

On June 19, 1941 the plaintiff issued a writ against the defendant claiming damages for breach of contract, or, alternatively, an account; the writ was served on the defendant and an appearance was entered on his behalf on July 25, 1941. The statement of claim ought to have been delivered in due time after entry of appearance; the plaintiff did nothing for over 12 years and in October, 1953, by his solicitor wrote to the defendant intimating that his claim was being revived and next month his solicitors gave notice by letter of their intention to proceed with action; the defendant went to the new solicitors, who gave notice of change and took out summons to dismiss the action for want of prosecution. The summons came before a master who took the view that after 12 years the action should be dismissed for want of prosecution; the plaintiff appealed to a judge who took the opposite view and said that the action was not to be dismissed. The Court of Appeal restored the decision of the master. But Denning L.J. at page 246 said:

"I am disposed to agree with what counsel for the defendant suggested, namely, that, by analogy with the Limitation Act, 1939, if a plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution unless the plaintiff can show some good reason why he should be allowed to go with it. In this case, it is not six years, but twelve years, and I am quite clear that after this length of time the plaintiff ought not to be allowed to go on with the action. I think the appeal should be allowed, and the order of the master restored."

In this case it will be seen the one month's notice was given, but the court nonetheless dismissed the action because of very long delay. In the present case there is no long delay, but the plaintiff did not give the one month's notice before issuing the notice of trial. No reason has been given as to why the one month's notice could not have been given before the notice of trial was issued. Mr. Williams himself has agreed that the notice should have been given. I set aside the notice of trial.

Costs of the application to the applicants (defendants).

Order accordingly.

Solicitors: *Williams & Tennakoon; S. K. Lee & Co.*

LAU TIN SYE v. YUSUF BIN MUHAMMAD

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) August 10, 1973]
[Kuala Trengganu — Federal Court Civil Appeal No. 66 of 1972]

Tort — Occupier's duty to invitee — Person injured by blade of tractor on land — Whether occupier of land or owner of tractor liable — Negligence — Duty of care.

The respondent was injured when his right foot was cut by the blade of a tractor belonging to the appellant and which had been hired out to plough the land belonging to one Mustapha. The respondent was not an employee of the appellant but had been allowed to travel on the tractor. The respondent obtained judgment in the High Court and the appellant appealed.

Held: (1) there was no evidence to show that the tractor driver was guilty of a breach of a duty to take care;

(2) the rule in *Indermaur* v. *Dames*(1) could not apply to this case, as even assuming the respondent was an invitee, he was not injured as a result of any dangerous condition of the land.

Case referred to:

(1) *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, 287.

FEDERAL COURT.

Datuk H. L. Wrigglesworth for the appellant.

Datuk Wan Mustapha for the respondent.

Ali F.J. (reading the judgment of the court): This is an appeal from the judgment of the High Court at Kota Bharu, Kelantan.

The respondent, an adult male aged over 20 years, was injured when his right foot was cut by a tractor's blade. He sued the appellant, the owner of the tractor, and obtained judgment. Upon a finding of contributory negligence against him the award of damage was reduced to half. The appellant has appealed against the whole decision of the trial court but as nothing was said on the quantum either in the memorandum of appeal or in the arguments before us, this appeal will be treated as an appeal against the finding on liability.

The respondent's cause of action on the pleadings was for a breach of an employer's duty to provide a safe system of work. This is clear from paragraphs 1 and 3 of the statement of claim. Although paragraph 5 alleges negligence the particulars of negligence set out are not those which usually support a case of negligence. Any way the cause of action, so far as it was based on an employer's liability to provide a safe system of work, must have failed because on the evidence before him the learned trial judge said this:

"On the evidence before me I found that the plaintiff was not an employee of the defendant."

The evidence at the trial disclosed the following facts: On June 11, 1969 the appellant's tractor was hired out to plough land belonging to one Mustapha bin Deraman. The tractor was driven by Mohamed bin Said who was assisted by Abdullah bin Hassan or Pak Su Lah as he was described by the respondent. The respondent and a person named Zahari bin Ismail were also there having been allowed to travel on the tractor. While the tractor was at work, Abdullah signalled to the driver to stop. The tractor stopped but its engine was still running. This means that the tractor blade kept on rotating. According to the evidence Abdullah had stopped the tractor in order to adjust the blade cover which, he said, was too high. The respondent, thinking that Abdullah was having some difficulty in lifting the blade cover, went to assist him. He admitted that no one had asked him to do so. He described the accident in these words:

"As I was trying to lift the blade cover my right foot was cut by the hidden blade."

He maintained that he did not know that the blade was rotating. In answer to a question in cross-examination he said:

"I do not know that I had put my right foot further inside. I was wearing canvas shoes."

Whether or not he slipped is not clear from the evidence. That was all that he could say of the accident. Abdullah who gave evidence for the appellant had said